

discriminatory practices by cable operators and vertically-integrated programmers⁴²⁵ that may inhibit competition from other MVPDs.⁴²⁶ In addition, the program access rules prohibit vertically-integrated programmers from entering into exclusive contracts with cable operators unless the arrangements are found by the Commission to be in the public interest.⁴²⁷ In making that public interest determination, the Commission is required to consider, and balance, five enumerated factors concerning the effect and duration of the exclusivity arrangement.⁴²⁸

150. As the Commission has consistently noted, exclusive arrangements can be used to deter entry and inhibit competition from other MVPDs in markets for the delivery of multichannel video programming.⁴²⁹ We have also consistently recognized, however, that exclusive arrangements can often produce efficiency benefits for the parties involved, and may increase competition, which can produce lower prices and increased choice for consumers in programming and distribution markets.⁴³⁰ When it created the program access regime, Congress struck a balance between these opposing effects of exclusive programming arrangements, and the Commission has implemented that balance in its rules and determination of program access complaints. By targeting and eliminating those vertical restraints that can impair competition in markets for the distribution of multichannel video programming, the Commission's enforcement of these rules is designed to contribute to the long-term performance of both distribution markets and programming markets.⁴³¹ Indeed, the program access rules have been credited as having been a necessary factor in the development of both the DBS and MMDS industries.⁴³²

⁴²⁵ A vertically-integrated programmer is one that shares ownership interests in common with one or more cable system operators.

⁴²⁶ *1995 Report*, 11 FCC Rcd at 2155 ¶ 157; *1994 Report*, 9 FCC Rcd at 7520-22 ¶¶ 157-60, 7528-30 ¶¶ 173-78.

⁴²⁷ 47 C.F.R. § 76.1002(c)(2).

⁴²⁸ 47 C.F.R. § 76.1002(c)(4).

⁴²⁹ *E.g.*, *1990 Report*, 5 FCC Rcd at 5021-32 ¶¶ 112-30; *1995 Report*, 11 FCC Rcd at 2135 ¶ 158.

⁴³⁰ *See, e.g.*, *1990 Cable Report*, 5 FCC Rcd at 5008-11 ¶¶ 82-91, 5031-32 ¶¶ 129-30; *1995 Report*, 11 FCC Rcd at 2135 ¶ 158.

⁴³¹ *E.g.*, *1995 Report*, 11 FCC Rcd at 2135 ¶ 158.

⁴³² *E.g.*, Eric Schine, *Digital TV: Advantage*, *Hughes*, Bus. Week, Mar. 13, 1995, at 14; *The Wireless Cable Industry*, Dillon Read Equity Research, Aug. 22, 1994, at 3.

151. *Commission Enforcement Activities.* The Commission has resolved ten program access disputes since the 1995 Report.⁴³³ The Commission also denied a Petition for Reconsideration of a program access decision issued in 1995.⁴³⁴ These cases are described in detail in Appendix H.

152. *Issues of Concern to Commenters in 1996.* Many parties agree that the program access rules have helped emerging competitors to cable obtain access to programming, although other parties continue to argue that the rules are unnecessary.⁴³⁵ As discussed below, some commenters allege that denials of access to programming continue to inhibit competition and urge expansion of the program access rules. In particular, these parties argue for application of the program access regime to non-satellite delivered programming services and to programming services of non-vertically integrated vendors, both of which are issues that we have addressed in prior Reports. In addition, commenters urge expedited review of program access complaints, clarification of the exception for pre-existing exclusive contracts, expansion of the program access rules to allow the recovery of damages, and application of the program access rules to exclusive arrangements between vertically-integrated programmers and non-cable MVPDs.

153. *Terrestrial Delivery.* A number of commenters urge the Commission to expand the application of the program access rules to include all programming -- regardless of how it is distributed.⁴³⁶ In particular, they argue that, as fiber-optic wiring becomes cheaper and easier to deploy and use, delivery of programming by terrestrial means instead of via satellite may permit cable operators to abuse vertical relationships between themselves and programmers.⁴³⁷ This fear

⁴³³ *Corporate Media Partners d/b/a Americast v. Continental Cablevision, Inc.*, 11 FCC Rcd 7735 (CSB 1996); *American Cable Company v. TeleCable of Columbus, Inc.*, CSR 4206, Memorandum Opinion & Order, 11 FCC Rcd 10090 (CSB 1996); *Interface Communications Group, Inc. v. Cablevision Systems Corp.*, CSR 4648-P, Order, ___ FCC Rcd ___, DA 96-1520 (CSB Sept. 13, 1996) (involving three separately filed complaints); *CAI Wireless Systems, Inc. v. Cablevision Systems, Inc.*, CSR 4479-P, Order, 11 FCC Rcd 3049 (CSB 1996); *CAI Wireless Systems, Inc. v. Cablevision Systems, Inc.*, Order, 11 FCC Rcd 3004 (CSB 1996); *Consumer Satellite Systems, Inc. v. United Video Satellite Group, Inc.*, CSR 4284-P, Order, 11 FCC Rcd 7428 (CSB 1996); *OpTel, Inc. v. Century Southwest Cable Television, Inc.*, CSR 4736-P, Order, ___ FCC Rcd ___, DA 96-2146 (CSB Dec. 20, 1996) 1997 WL 558; *TELE-TV Media, L.P. v. Century Communications Corporation*, CSR 4822-P, Order, ___ FCC Rcd ___, DA 96-2147 (CSB Dec. 20, 1996) 1996 WL 729055. See *infra* App. H.

⁴³⁴ *CellularVision of New York, L.P. v. SportsChannel Associates*, Order on Reconsideration, 11 FCC Rcd 3001 (CSB 1996); *infra* App. H.

⁴³⁵ E.g., HBO Comments at 3-4.

⁴³⁶ See, e.g., RCN Comments at 5; WCAI Comments at 21-23; Ameritech New Media Reply Comments at 4; TELE-TV Reply Comments at 2-13.

⁴³⁷ *Id.*

is raised particularly with regard to local sports networks.⁴³⁸ Other commenters, however, oppose the application of the program access rules to programming delivered by means other than satellite, arguing that it would be an unwarranted extension of the program access rules.⁴³⁹

154. We recognize that improved technology and lower costs are improving the efficiency of terrestrial distribution of programming, particularly over fiber-optic facilities. As a result, it appears that it may become possible for a vertically-integrated programmer to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules concerning access to programming.⁴⁴⁰ If a trend of such conduct were to occur, we would have to consider an appropriate response to ensure continued access to programming. To date, however, we have seen no evidence that such strategic conduct has actually occurred.

155. *Non-Vertically Integrated Programming.* Several parties argue for an extension of the program access rules to non-vertically integrated programmers.⁴⁴¹ For example, Ameritech New Media requests that the Commission recommend to Congress that the law be clarified or changed to ensure that new MVPDs have access to non-vertically integrated video programming. In support, it cites press reports which state that two broadcast networks are offering exclusive carriage terms to incumbent cable operators for their new 24-hour news channels and asserts that such contracts could have a stifling effect on competition.⁴⁴² In addition, WCAI filed an ex parte letter on November 18, 1996, alleging that several non-vertically integrated programmers are refusing outright to provide service to MMDS operators, and that other non-vertically integrated programmers expect to be paid surcharges by MMDS operators.⁴⁴³ WCAI argues that cable operators have the same power and incentive to induce non-vertically integrated programmers to deny competing MVPDs access to their programming as they do with respect to vertically-integrated programmers.⁴⁴⁴ Consequently, WCAI argues that the program access rules should be

⁴³⁸ See *supra* para. 148 (observing that Fox TV and TCI-Liberty have entered into a joint venture to own and operate regional sports programming networks).

⁴³⁹ E.g., Viacom Reply Comments at 4 n.4.

⁴⁴⁰ See 1994 Report, 9 FCC Rcd at 7622, App. H ¶ 31 (focus should be on "policy-relevant" barriers to entry). See also *In re Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems*, Second Report and Order ___ FCC Rcd ___, FCC 96-249, ¶ 103 n.451 (1996) ("[W]e do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs.").

⁴⁴¹ See, e.g., RCN Comments at 5; SBC Comments at 6; WCAI Comments at 20-22.

⁴⁴² Ameritech New Media Comments at 9.

⁴⁴³ See WCAI Nov. 18, 1996 *ex parte* presentation at 1-2.

⁴⁴⁴ *Id.* See also David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 Fed. Comm. L.J. 511 (1995).

applied to all programming without regard to the degree of integration between programmers and cable operators.

156. Other commenters urge the Commission to reject these calls for expansion of the program access rules to cover non-vertically integrated programmers, arguing that such an interpretation is inapposite to both legislative intent and the policies underlying the rules.⁴⁴⁵ These commenters argue that Congress clearly intended to limit the power of cable operators and their affiliates rather than seeking to regulate programmers per se,⁴⁴⁶ and that Congress reaffirmed this intent by limiting the program access provisions in the 1996 Act to vertically-integrated programmers.⁴⁴⁷ They also argue that no meaningful evidence has been presented indicating that non-cable MVPDs are being denied access to programming from non-vertically-integrated programmers.⁴⁴⁸ Finally, commenters opposing extension of the program access rules to non-vertically-integrated programmers argue that such an extension would only impede the development of new programming, and would not promote competition with incumbent cable systems.⁴⁴⁹

157. As in prior years, we recognize the concern raised by some parties that access to programming from non-vertically integrated programmers may inhibit competition in markets for the distribution of multichannel video programming.⁴⁵⁰ The evidence before us, however, is insufficient for us to make any determination concerning the effect, if any, that exclusive arrangements involving non-vertically integrated programmers may have on competition in local markets for the delivery of multichannel video programming.

158. *Pre-Existing Exclusive Arrangements.* Several commenters argue that the "grandfathering" provision of Section 628(h) of the Communications Act -- which exempts exclusive contracts entered into on or before June 1, 1990, and renewed or extended before October 5, 1992, from the public interest inquiry of exclusive contracts -- raises serious competitive concerns.⁴⁵¹ For example, Ameritech New Media submits that local exchange carriers

⁴⁴⁵ See, e.g., ESPN Reply Comments; Lifetime Reply Comments at 4-7; NCTA Reply Comments at 12-15; Viacom Reply Comments at 3-7.

⁴⁴⁶ Lifetime Reply Comments at 5.

⁴⁴⁷ E.g., ESPN Reply Comments at 1-2; Viacom Reply Comments at 5. See Communications Act § 628(j), 47 U.S.C. § 548(j) (as amended by the 1996 Act to cover programming carried by common carriers).

⁴⁴⁸ E.g., ESPN Reply Comments at 2.

⁴⁴⁹ Viacom Reply Comments at 4-5.

⁴⁵⁰ 1995 Report, 11 FCC Rcd at 2140 ¶ 169; 1994 Report, 9 FCC Rcd at 7530-31 ¶¶ 179-80.

⁴⁵¹ See, e.g., Ameritech New Media Comments at 9-10; OpTel Comments at 6-7; GTE Service Corp. Reply Comments at 6-8.

and their affiliates typically do not have any exclusive distribution contracts because LECs generally were barred at that time (before June 1, 1990) from providing video programming services. Thus, Ameritech New Media contends that it is disadvantaged vis-a-vis cable operators, in that cable operators are able to take advantage of the grandfathering provision, while LECs and their affiliates are not.⁴⁵² After review, we find that we do not have -- and Ameritech New Media has not provided -- sufficient information to permit us to make any decision at this time regarding the alleged anti-competitive effects resulting from the grandfathering provisions of Section 628(h).

159. *Expedited Enforcement.* To improve enforcement of the existing rules, some commenters urge expedited review of program access complaints.⁴⁵³ As a preliminary matter, we believe the procedures established in our rules for program access complaints already provide for an expedited procedure to resolve such disputes, and that commenters have not presented any additional evidence to suggest that revising these procedures would further accelerate this process. Nonetheless, we reaffirm our commitment to follow Congress's clear mandate in both the 1992 Act and, most recently, the 1996 Act to promote competition as quickly as possible. Consequently, the Commission will continue both to process program access complaints in the most expeditious fashion possible, and to continue vigilant and meaningful enforcement policies in this area.

160. *Penalties and Damage Awards.* Several commenters argue that the Commission should provide for damage awards against parties found to have violated the program access rules.⁴⁵⁴ According to these parties, without a meaningful penalty, the program access provisions are insufficient, standing alone, to deter strategic vertical conduct by cable operators. Other parties disagree, arguing that a damages remedy is neither necessary nor appropriate under the program access rules.⁴⁵⁵ Although we recognize the concerns of the commenters, these parties have not provided sufficient evidence to persuade us that penalties are necessary at this time to ensure effective enforcement of our program access rules.

161. *Sublicensing.* OpTel, RCN and others assert that in markets where they compete against vertically integrated cable MSOs, the MSOs have refused to sublicense popular cable network programming, particularly local and regional sports and other popular satellite cable

⁴⁵² Ameritech New Media Comments at 8.

⁴⁵³ OpTel Comments at 10; TELE-TV Reply Comments at 20-22.

⁴⁵⁴ See NRTC Comments at 8-9; NRTC Reply Comments at 2-3, 5-6; OpTel Reply Comments at 1; TELE-TV Reply Comments at 13-20.

⁴⁵⁵ See, e.g., Superstar Satellite Entertainment Reply Comments at 3-4.

programming.⁴⁵⁶ OpTel and RCN contend that this refusal precludes them from offering an attractive program lineup. As a result, they claim to be disadvantaged in trying to attract subscribers and not to be able to compete effectively against the incumbent cable franchisee.⁴⁵⁷

162. The parties raising these sublicensing concerns have filed program access complaints with the Commission concerning the same facts that form the basis for their assertions.⁴⁵⁸ We believe that those complaint proceedings are the appropriate arenas for examining the particular merits of their claims, and decline to interfere with those proceedings by addressing the comments in this *Report*.

163. *Exclusive Arrangements with Non-Cable MVPDs.* National Rural Telecommunications Cooperative ("NRTC") argues in its comments that it is unable to obtain the right to distribute programming it deems critical for competitive success because that programming is covered by exclusive arrangements with other non-cable MVPDs in areas unserved by cable.⁴⁵⁹ NRTC argues that its failure to receive the desired programming is the result of efforts by the vertically-integrated cable industry to stifle competition from non-cable MVPDs. TCI responds to NRTC's argument by pointing out that the Commission has explicitly rejected this concern, and argues that NRTC is in no position to complain about exclusive arrangements with its competitors since it also is the beneficiary of exclusive arrangements for access to programming.⁴⁶⁰

164. As we discussed in response to NRTC's argument last year, the Commission has denied a petition by NRTC to include exclusive contracts between DBS operators (which are non-cable MVPDs) and vertically-integrated programmers within the *per se* prohibition of Section 628(c)(2)(C) of the Communications Act and Section 76.1002(c) of the Commission's rules.⁴⁶¹ Instead, the Commission noted that NRTC, or any other aggrieved party, may pursue relief from

⁴⁵⁶ WCAI Comments at 21; OpTel Comments at 10; RCN Comments at 4. *See also* Communications Act § 628(b), 47 U.S.C. § 548(b). TELE-TV, a program packager serving C-Band satellite subscribers, notes in its comments on a related matter that in some markets it serves, local and regional sports programming is as popular with its subscribers as the networks' prime-time shows in programming appeal. TELE-TV Reply Comments at 3.

⁴⁵⁷ OpTel Reply Comments at 1-2; RCN Comments at 5-6.

⁴⁵⁸ *OpTel, Inc. v. Century Communications, Inc.*, Complaint, CSR-4736-P (filed April 19, 1996), Joint Stipulation of Dismissal, DA 96-2146, __ FCC Rcd __ (CSB Dec. 20, 1996), 1997 WL 558; *Interface Communications Group, Inc. v. Cablevision Systems Corp.*, Order, DA 96-1520, __ FCC Rcd __ (CSB Sept. 13, 1996), CSR-4648-P, 1996 WL 523477, Petition for Partial Reconsideration (filed Oct. 15, 1996).

⁴⁵⁹ NRTC Comments at 3-4.

⁴⁶⁰ TCI Reply Comments at 11-13.

⁴⁶¹ *1995 Report*, 11 FCC Rcd at 2138-39 ¶ 166 (citing *Implementation of Sections 12 & 19 of the 1992 Cable Act, Dev. of Competition & Diversity in Video Programming Dist. & Carriage*, MM Dkt. No. 92-265, Memorandum Opinion & Order on Reconsideration of the First Report & Order, 10 FCC Rcd 3105 (1994)).

such exclusive arrangements through other provisions of the program access and program carriage rules.⁴⁶² We see no reason to revise our determination based on the record before us this year.

b. Additional Competitive Issues Relating to Vertical Integration

165. *Channel Occupancy Comments.* In the *Notice*, we sought comments on the channel occupancy rules and their effect on competition.⁴⁶³ Pay-Per-View Network, Inc. d/b/a Viewer's Choice ("Viewer's Choice") states that the channel occupancy rules are unwarranted and are an artificial restraint that may deprive consumers of programming they prefer.⁴⁶⁴ Viewer's Choice claims that, while it is difficult to quantify the precise impact of the channel occupancy rules, these restrictions have limited the ability of affiliated cable systems to offer as many of its pay-per-view services as they might otherwise choose to do in response to consumer demand.⁴⁶⁵ It asserts that this limit also affects its ability to maximize its subscriber base and adversely affects its ability to obtain quality programming.⁴⁶⁶ Viewer's Choice concludes that the channel occupancy rules do not strike the intended balance between the risks of vertical integration and the benefits of the development of diverse programming.⁴⁶⁷

166. We note that an appeal to the United States Court of Appeals for the District of Columbia Circuit by Bell Atlantic and Time Warner of the Commission's 1995 reconsideration decision of its channel occupancy rules is being held in abeyance by the court pending Commission resolution of certain reconsideration petition issues applicable to the channel occupancy rules.⁴⁶⁸ In light of this procedural status, it would be inappropriate to comment on the merits of these comments in this *Report*.

⁴⁶² 1995 *Report*, 11 FCC Rcd at 2138-39 ¶ 166.

⁴⁶³ *Notice*, 11 FCC Rcd at 7417 ¶¶ 20, 22. The channel occupancy rules restrict the number of channels on a cable system that may be occupied by programmers affiliated with the owner of that system. See 1994 *Report*, 9 FCC Rcd at 7521 ¶ 159 n.432.

⁴⁶⁴ Viewer's Choice Comments at 2-3. Viewer's Choice is owned by two major motion picture companies and seven MSOs and offers five channels of pay-per-view programming.

⁴⁶⁵ *Id.* at 4.

⁴⁶⁶ *Id.* at 6-7.

⁴⁶⁷ *Id.* at 7-8.

⁴⁶⁸ See *Cablevision, Inc. v. United States*, 835 F. Supp. (D.D.C. 1993), *aff'd in part by Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996). See also *Implementation of Section 11(c) of the Cable Television Consumer Protection & Competition Act of 1992 (Vertical Integration Limits)*, MM Dkt. No. 92-264, Memorandum Opinion & Order on Reconsideration of the Second Report & Order, 10 FCC Rcd 7364 (1995).

167. *Leased Access.* A further attempt to address concerns relating to media diversity is found in the statutory leased access requirements of cable operators.⁴⁶⁹ ValueVision International ("ValueVision"), references the Commission's tentative conclusion that the 1993 rules implementing the leased access provisions have failed to promote diverse sources of programming,⁴⁷⁰ and then asserts that it has "actually *lost* access to hundreds of thousands of cable subscribers under the implicit fee formula for leased access"⁴⁷¹ Video Information Providers for Non-discriminatory Access ("VIPNA") recently conducted a survey of 149 cable systems in the top 100 markets and found that only eight percent of cable operators indicated that they were currently leasing capacity.⁴⁷² Others have provided information suggesting that a market for leasing channel capacity does in fact exist, particularly for the provision of part-time programming. For example, in the leased access proceeding Cox Cable submitted information relating to such leasing on 13 of its systems.⁴⁷³ However, systematic information on the use of leased access channels was not available to us in the course of this proceeding and does not appear to be otherwise available.

168. In March of this year, the Commission stated its belief that the highest implicit fee formula is likely to overcompensate cable operators, and does not sufficiently promote the goals underlying the leased access provisions of the Communications Act,⁴⁷⁴ and proposed an alternative rate formula.⁴⁷⁵ In the *Leased Access Further Notice*, the Commission also considered a number of other issues relating to leased access: a possible transition period, the rate for part-time programming, tier and channel placement, and preferential treatment for nonprofit programmers. In general, leased access programmers support the Commission's proposed rate formula in opposition to cable operators and non-leased access programmers. For example, ValueVision supports the reforms proposed in the *Leased Access Further Notice* as a means to promote the carriage of leased access programming and seeks prompt action in that proceeding.⁴⁷⁶ However, independent non-leased access programmers such as Lifetime Television and Viacom claim that

⁴⁶⁹ Communications Act § 612, 47 U.S.C. § 532.

⁴⁷⁰ ValueVision Comments at 1-2. *See also* 1995 Report, 11 FCC Rcd at 2142 ¶ 172.

⁴⁷¹ ValueVision Comments at 2.

⁴⁷² VIPNA *ex parte* presentation, Dec. 9, 1996. It appears that VIPNA treated each non-response as a "no" response in computing the eight-percent estimate of operators who are currently leasing capacity.

⁴⁷³ Cox Communications, Inc. *ex parte* letter dated Nov. 14, 1996.

⁴⁷⁴ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (Leased Commercial Access)*, MM Dkt. No. 92-266, Order on Reconsideration of the First Report & Order and Further Notice of Proposed Rulemaking, __ FCC Rcd __, FCC 96-122 ¶¶ 13-14 ("*Leased Access Further NPRM*").

⁴⁷⁵ *Leased Access Further NPRM*, FCC 96-122 ¶¶ 26-38.

⁴⁷⁶ ValueVision Comments at 2-3.

the pending proposals to provide a "regulatory boost for leased access programming only result in a further squeeze on channel capacity" and make it more difficult for independent programmers to gain cable carriage.⁴⁷⁷ As noted in the *Leased Access Further Notice*, the challenge before the Commission in completing the rulemaking is to promote leased access without adversely impacting the operation, financial condition, or market development of cable systems.⁴⁷⁸

169. *1996 Telecommunications Act*. In the *Second OVS Report and Order*,⁴⁷⁹ the Commission concluded that, pursuant to Section 653(c)(1)(a), the program access restrictions should apply to the conduct of open video system operators in the same manner as they currently apply to cable operators and common carriers or their affiliates that provide video programming directly to subscribers.⁴⁸⁰ The Commission concluded that it was appropriate to apply Section 628 to open video system operators by creating parallel provisions for cable operators and open video system operators. The Commission also determined that, in order to effectuate the purposes of the program access statute in the open video system context, open video system programming providers should be subject to the program access provisions. Specifically, we concluded that we would extend our program access rules to prohibit cable-affiliated satellite programmers and cable-affiliated open video system programming providers from entering into exclusive programming agreements, unless the Commission first determines that the exclusive arrangement is in the public interest under the five public interest factors listed in Section 628(c)(4).⁴⁸¹ Finally, we found that open video system programming providers that provide more than one channel of programming clearly fit within the definition of an MVPD and are therefore entitled to the benefits of the program access provisions.⁴⁸²

⁴⁷⁷ Lifetime Reply Comments at 2-3; Viacom Comments at 3-5.

⁴⁷⁸ *Leased Access Further NPRM*, FCC 96-122 ¶ 26.

⁴⁷⁹ *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, CS Dkt. No. 96-46, Second Report & Order, ___ FCC Rcd ___, FCC 96-249 (June 3, 1996) ("*Second OVS Report & Order*"), summarized at 61 Fed. Reg. 28695 (June 5, 1996).

⁴⁸⁰ *Id.* at ¶ 175. See also *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, CS Dkt. No. 96-46, Third Report & Order and Second Order on Reconsideration, ___ FCC Rcd ___, FCC 96-334 (Aug. 8, 1996).

⁴⁸¹ *Second OVS Report & Order*, FCC 96-249 ¶¶ 186-94. The five factors listed in Section 628(c)(4) are (A) the effect of the exclusive contract on the development of competition in local and national multichannel video programming distribution markets; (B) the effect of the exclusive contract on competition from multichannel video programming distribution technologies other than cable; (C) the effect of the exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming; (D) the effect of the exclusive contract on diversity of programming in the multichannel video programming distribution market; and (E) the duration of the contract.

⁴⁸² *Id.* at ¶¶ 195-96.

C. Technical Advances

170. In the *1995 Report*, the Commission noted that in anticipation of emerging competition in markets for the delivery of video services, many MVPDs were planning to enhance standard services and expand offerings to include new services, many of which require increased bandwidth and two-way network capabilities.⁴⁸³ We discussed the two primary strategies MVPDs were employing to increase capacity: upgrading wired network architecture and deploying digital compression.⁴⁸⁴ In this section, we update the status of MVPD efforts to develop and deploy new architectures and technologies to accomplish their competitive goals, and report on recent developments in subscriber interface products such as set-top boxes and modems.

1. Upgrading Wired Architectures

171. Deployment of fiber optic cable remains one of the key components of network upgrades for both cable companies and LECs. During the past year, the cable industry's deployment of fiber optic cable in its networks grew by over 18%, for a total of 81,323 route miles.⁴⁸⁵ During 1995, LEC deployment of fiber optic cable in their networks increased by 12%, or 22,871 sheath miles, to a total of 218,737 sheath miles of fiber optic cable in their networks.⁴⁸⁶

172. *Hybrid Fiber Coaxial Cable.* As reported in the *1995 Report*, both cable operators and LECs are deploying hybrid fiber coaxial cable ("HFC") architectures to upgrade their networks.⁴⁸⁷ Industry analysts report that HFC network architecture currently exists in approximately 35 percent of all cable systems, and that over one-third of all cable subscribers are served by systems employing HFC architecture.⁴⁸⁸

⁴⁸³ *1995 Report*, 11 FCC Rcd at 2144 ¶ 179.

⁴⁸⁴ *Id.* at 2142-50 ¶¶ 173-93. Last year's report contains basic background information on the capabilities of different video, voice and data delivery mechanisms, descriptions of various technologies, and brief explanations of the competitive implications of technological innovations and limitations. Rather than repeat this important information here, we refer the reader to last year's report.

⁴⁸⁵ NCTA Comments, App. D, at 5.

⁴⁸⁶ Jonathan Kraushaar, Federal Communications Commission, *1995 Fiber Deployment Update* 22 (July 1996). Route miles of fiber are the total number of fiber routes while the actual length of the cable used in route miles is referred to as sheath miles of fiber (which is equal to or greater than route mileage).

⁴⁸⁷ For a description of wired architecture see *1995 Report*, 11 FCC Rcd at 2144-46 ¶¶ 180-85. In October, TCI announced that it would aggressively deploy digital set-top boxes in its rural and small market systems rather than rebuilding them, in response to investor concerns and competition from DBS. David Kirkpatrick, *Malone's New Strategy for TCI Lifts Firm's Long-Sagging Stock*, Wall St. J., Oct. 28, 1996, at B6; John M. Higgins & Leslie Ellis, *TCI's Woes Rock Market*, Multichannel News, Oct. 29, 1996, at 1.

⁴⁸⁸ The Yankee Group, *Bringing Broadband Home: New Networks for New Services*, Dec. 1995, at 28.

173. *Switched Digital Video.* The other principal architecture primarily supported by LECs to upgrade video delivery capability in their networks is Switched Digital Video ("SDV").⁴⁸⁹ Last year we noted that HFC advocates emphasized the lower cost of the HFC solution relative to installing fiber-to-the curb in an SDV architecture. We note here that at least one analyst asserts that while HFC is more cost effective when service penetration (percent of customers who actually buy the new video service) is low, once penetration reaches 40-60% SDV is the more cost-effective architecture.⁴⁹⁰

174. HFC and SDV architectures each have their separate proponents.⁴⁹¹ Currently GTE, Ameritech, Pacific Bell, BellSouth, Southern New England Telecommunications and U S West appear to favor deployment of HFC based architecture, while Bell Atlantic, NYNEX and SBC Communications appear to prefer SDV.⁴⁹²

175. *Fiber Optic Rings.* MSOs are increasingly deploying regional hubs for interconnection of headends using high capacity fiber optic rings.⁴⁹³ According to NCTA, sharing main switching facilities potentially reduces equipment costs by as much as \$7 million per switch.⁴⁹⁴ Proponents of the regional hub concept claim that it not only shares with other MSOs the economic costs and benefits but also speeds the deployment of advanced services such as telephony and interactive two-way services by allowing cable companies to interconnect with other telecommunications networks.

2. *Digital Compression*

176. As noted in the *1995 Report*, digital compression, which radically reduces storage and transmission costs, is the other key strategy for increasing communications capacity.⁴⁹⁵ Last

⁴⁸⁹ *FTTC The Right Choice In The Long Term*, America's Network, Feb. 15, 1996, at 34.

⁴⁹⁰ To offer digital video/telephony services over an SDV network, the complete switching and broadband transport functions are embedded in the host digital terminal (HDT) up front, making the initial investment high. In an HFC network, the switching function grows as new services are offered. Andrew W. Davis, *Switched Network vs. Hybrid Coaxial For Two-Way Video From Telcos or Cable*, Advanced Imaging, Mar. 1, 1996, at 65.

⁴⁹¹ *All the Right Moves*, Internet Telephony, <http://www.internettelephony.com/issue/coverstory/.html>.

⁴⁹² *All the Right Moves*, Internet Telephony, <http://www.internettelephony.com/issue/coverstory/coverstory.html>.

⁴⁹³ NCTA Comments, App. D, at 10.

⁴⁹⁴ NCTA Comments, App. D, at 10.

⁴⁹⁵ *1995 Report*, 11 FCC Rcd at 2144 ¶ 179.

year we reported that various compression techniques had ratios as high as 10:1.⁴⁹⁶ This year, ratios as high as 24:1 have been tested.⁴⁹⁷

177. *DBS and MMDS.* In the past year, DBS providers have continued to increase their use of digital technologies⁴⁹⁸ while MMDS operators were authorized to use digital transmission on ITFS, MDS and MMDS frequencies.⁴⁹⁹

178. *Digital Programming.* By the end of this year, digital programming will be available from many major program suppliers. HBO reports that it has begun offering all of its HBO and Cinemax feeds in digital format.⁵⁰⁰

179. In October, TCI launched an initial digital video rollout in Hartford, Connecticut, delivering 40 pay-per-view, 25 premium and 18 special interest basic channels.⁵⁰¹ Other digital video sources that will reportedly be available by year end include: HBO/Cinemax - six channels (per time zone); Showtime/The Movie Channel -- five channels (per time zone); Sundance Channel and Flix -- one channel each; Viewer's Choice -- 11 channels.⁵⁰² Additionally, in October, three cable programming services: Discovery Communications (TCI is a major investor), Arts & Entertainment and ESPN, launched new, digital only cable services.⁵⁰³

3. *Subscriber Interface*

180. *Set-Top Boxes.* Set-top boxes or digital television receivers are necessary for customers to receive digital programming. The boxes on top of customers' TV sets will enable cable companies to offer as many as 300 channels and interactive digital television services

⁴⁹⁶ *Id.* at 2147 ¶ 186.

⁴⁹⁷ *Satellite Slot For Digital Channels*, Electronic Times, Sept. 19, 1996, at 12; Joan India Rigdon, *IMedia Crams More Channels Onto Television*, Wall St. J., Dec. 4, 1996, at B1; *Western Cable Show Notebook*, Comm. Daily, Dec. 12, 1996, at 3. This level of compression may not be achievable for programming such as sporting events.

⁴⁹⁸ As discussed in the *1995 Report*, DBS providers, including DIRECTV, USSB, and PRIMESTAR, were the first MVPDs to implement digital compression technology on a wide scale. *1995 Report*, 11 FCC Rcd at 2147 ¶ 188 (1995).

⁴⁹⁹ *E.g.*, *supra* secs. III.B, III.G.

⁵⁰⁰ HBO Comments at 5.

⁵⁰¹ Stump & Workman, *TCI Hones Digital Package*, Cable World, Aug. 26, 1996, at 1.

⁵⁰² Jim Barthold, *TelQuest vs. HITS*, Cable World, Aug. 26, 1996, at 29.

⁵⁰³ Michael Burgi, *Ready For Digital Cable TV: Discover, A&E, ESPN To Introduce First Digital Services Next Month*, Media Week, Sept. 16, 1996, at 8.

including Internet access, video on demand, pay-per-view TV broadcasting, home shopping and electronic commerce, over the same cables by unscrambling information-packed digitized signals.⁵⁰⁴ While widespread deployment of digital set-top boxes has not yet occurred with the exception of DBS set-top boxes, various other entities are developing and deploying set-top boxes in limited areas. While the cost of digital set-top boxes has been a significant factor in delaying the implementation of digital technology, silicon-chip producers are predicting that advances in technology will result in decreased prices for mass produced digital set-top boxes.⁵⁰⁵

181. On October 3, 1996, Cable Television Laboratories Inc. announced, along with representatives of the two major suppliers of digital video equipment, General Instruments and Scientific-Atlanta ("SA"), a set of de facto private sector standards (including encryption security) for digital cable equipment, which will allow set-top terminals and data modems built by different manufacturers to work together (interoperate) on the same cable system.⁵⁰⁶

182. *Universal Set-Top Box.* Universal or "unity" boxes are envisioned as being capable of handling wireless cable, asymmetrical digital subscriber line (ADSL), switched digital video, fiber-coaxial and DBS services thereby promoting the universal compatibility and operability of digital cable and satellite TV systems. While there has been significant investment in digital set-top box technology during the past year,⁵⁰⁷ the production of a digital set-top package that is universally compatible, consumer affordable and provides adequate signal security has so far proven elusive.⁵⁰⁸

183. There currently is disagreement between video retailers and DTH satellite providers regarding the protection of signal security in universal set-top boxes. The Satellite Broadcasting and Communications Association of America ("SBCA") argues that if all security circuitry is hardwired into set-top boxes mass produced by third party manufacturers, the manufacturers will only have a vested interest in selling the boxes, not in maintaining the security of the encoded

⁵⁰⁴ Mark LaPedus, *Taiwan Companies See The Emerging Market As Their Entree Into The International Consumer Arena*, Electronic Buyers' News, Sept. 16, 1996, at 48.

⁵⁰⁵ Leslie Ellis, *LSI's Logic: Digital Boxes Will Cost Less By Years End*, Multichannel News, Mar. 11, 1996, at 37. In September, GI announced that it would be coming out with two digital set-top modems featuring dual prime and MPEG-1 and MPEG-2 digital compression capabilities, one for cable providers (\$425) and one for wireless systems (\$375). *Digital Set-Top Era Finally at Hand as Vendors Target Second-Tier Operators*, Interactive Video News, Aug. 19, 1996, at __, 1996 WL 8025656.

⁵⁰⁶ *Cable Industry Agrees on Key Elements of Digital Systems Specification*, Bus. Wire, Oct. 3, 1996.

⁵⁰⁷ Jeffrey Trachtenberg, *Bell Alliance to Buy Over \$1 Billion Of Set-Top Boxes to Offer Wireless TV*, Wall St. J., Aug. 22, 1995, at B3.

⁵⁰⁸ *Digital Settop Era Finally At Hand As Vendors Target Second-Tier Operators*, Interactive Video News, Aug. 19, 1996, at __, 1996 WL 8025656.

signal.⁵⁰⁹ To the contrary, Circuit City, a major retailer of video products, asserts that instead of hardwiring all security circuitry into universal set-top boxes, signal security can be maintained by using a common security interface that would allow all security circuitry to be placed on an item such as a card that could be inserted in the universal set-top box by the subscriber.⁵¹⁰

184. *Asynchronous Digital Subscriber Line*. Asynchronous digital subscriber line ("ADSL") is seen by some as a rival to ISDN and cable modems⁵¹¹ and is being tested by telephone companies for the delivery of information in video and multimedia formats.⁵¹² Currently, however, no LEC or cable system has begun commercial ADSL operations. In the past year, Ameritech, Pacific Bell, U S West Communications, Bell Atlantic Corp., BellSouth Corp. and GTE Corp. all announced Internet access trials using ADSL technology.⁵¹³

V. ISSUES

A. Legal and Regulatory Obstacles

1. Local and State Laws and Regulations

185. In the *1995 Report*, the Commission noted that some local laws and regulations may create impediments to entry and competition in markets for the delivery of video programming.⁵¹⁴ We cited local franchise regulations and zoning restrictions on video receiving equipment as examples of such impediments. The Commission voiced its continued support for clarification of Section 621(a) of the Communications Act, which prohibits the unreasonable denial of a competitive franchise. Specifically, we recommended that Congress clarify that

⁵⁰⁹ SBCA Comments at 17.

⁵¹⁰ Circuit City Inc. Comments at 5.

⁵¹¹ Lavilla, Tom, *ADSL Broadband Access Gaining Momentum*, PC Week, Aug. 26, 1996, at 1. Some analysts refer to ADSL as a high speed modem technology, while others refer to it as a transmission technology. See *About ADSL*, <http://www.gte.com/Adsl/About/Docs/adslfaq.html>; and *ADSL News*, <http://www.gte.com/Adsl/News/Docs/960206.html>.

⁵¹² By converting existing twisted pair copper telephone lines into access paths for multimedia and high-speed data communications ADSL transmits more than 6Mbps downstream to a subscriber and as much as 600K upstream over a distance of 6000 feet. It depends on advanced digital signal processing and other techniques such as the use of DMT or CAP standards to squeeze information through twisted-pair telephone wires. The Yankee Group, *Bringing Broadband Home: New Networks For New Services* 18-21 (Dec. 1995).

⁵¹³ Tom Lavilla, *ADSL Broadband Gaining Momentum*, PC Week, Aug. 26, 1996, at 1; *WAN Services & Equipment*, Communications Week, Sept. 23, 1996, at 29; Beth Snyder, *Microsoft Takes the Plunge into ADSL Waters with GTE*, *News of the Week* <http://www.internettelephony.com/archive/8.19.96/NOTV.html#A6>, Aug. 19, 1996.

⁵¹⁴ *1995 Report*, 11 FCC Rcd at 2157 ¶¶ 212-13.

Section 621(a) applies to all exclusive franchises, regardless of when they were adopted. Congress has not acted on this recommendation. The Commission also noted that local zoning regulations may inhibit competition in the video programming delivery market by preventing direct-to-home distributors' customers from installing receiving dishes.

186. In Section 207 of the 1996 Act, Congress required the Commission to promulgate rules prohibiting restrictions on viewers' ability to receive video programming from over-the-air broadcasts, MMDS services, or DBS services,⁵¹⁵ and the Commission modified its rules to implement Section 207.⁵¹⁶ In response to the *Notice*, commenters generally voiced concerns that local restrictions on receiving equipment have unreasonably restrained competition in markets for the delivery of video programming and expressed agreement with the responses by Congress and the Commission.⁵¹⁷ In addition, NRTC urges the Commission to extend its preemption policy to protect renters and other viewers who do not own the property on which DBS equipment would be placed.⁵¹⁸ NRTC also urges the Commission to replace its rebuttable presumption policy with a per se preemption standard for both government and non-government restrictions.⁵¹⁹

187. Commenters argue that other local and state laws and regulations impede entry into markets for the delivery of video programming. BellSouth generally identifies local franchising obstacles or delays as a substantial obstacle to successful entry.⁵²⁰ SBC notes that Texas imposes more requirements on LECs wishing to offer video service than the 1996 Act does.⁵²¹ For example, Texas requires these LECs to offer video service through a separate subsidiary. In addition, LECs offering equipment or services to their video programming subsidiary must provide the same equipment and services to other video programming providers. SBC argues that these provisions of Texas law may deter entry by LECs and reduce competition in video delivery markets.

2. Federal Laws and Regulations

⁵¹⁵ WCAI Comments at 8-10.

⁵¹⁶ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Dkt. No. 95-59, Report and Order, Memorandum Opinion & Order and Further Notice of Proposed Rulemaking, __ FCC Rcd __, FCC 96-328 (Aug. 6, 1996) summarized at 61 Fed. Reg. 46557 (Sept. 4, 1996). The modified rules became effective on Oct. 14, 1996.

⁵¹⁷ WCAI Comments at 10; SBCA Comments at 17-19; Bell Atlantic Comments at 4; CellularVision Comments at 5-7.

⁵¹⁸ NRTC Reply Comments at 8-9.

⁵¹⁹ NRTC Comments at 9-11.

⁵²⁰ BellSouth Comments at 3-4.

⁵²¹ SBC Comments at 6-7.

188. In the *1995 Report*, the Commission cited its efforts and those of the courts to eliminate or reduce legal and regulatory impediments to entry into video programming delivery markets.⁵²² Earlier in this *Report*, we reported on implementation items that may further reduce these impediments.⁵²³ In response to the *Notice*, a number of parties suggest additional changes to further promote competition in markets for the delivery of video programming.

a. Cable Home Wiring

189. Several commenters argue that the Commission's cable home wiring rules continue to impede entry and competition. According to RCN, the Commission's rules establish a demarcation point in MDU buildings that is often inaccessible to competing video programming providers because it is imbedded inside the building's walls.⁵²⁴ RCN requests that the Commission change its rules to make the demarcation point accessible to all video programming providers.⁵²⁵ WCAI and Ameritech New Media agree with RCN's suggestion, arguing that entrants should have access to wiring dedicated to individual dwellings inside MDUs.⁵²⁶ GTE argues that the current rules concerning inside wiring in MDUs encourages incumbent cable system operators to use loop-through wiring, in which a single wire is used to serve multiple subscribers.⁵²⁷ The Commission's home wiring rules do not apply to loop-through wiring.

190. NCTA voices its opposition to proposals to allow rival video programming distributors to use a cable operator's inside wiring in MDU buildings.⁵²⁸ In general, NCTA argues that by leading to a single wire rather than multiple wires, these proposals will impede rather than promote competition. In particular, NCTA argues that moving the demarcation point will deter cable investment by increasing the risk that future upgrades will have to be given to rivals.

191. The comments addressing issues related to cable home wiring raise significant issues concerning cable operators' ability, under the Commission's current home wiring rules, to impede or prevent the entry of rival MVPDs by denying them access to cable wiring in MDU

⁵²² *1995 Report*, 11 FCC Rcd at 2156 ¶¶ 210-11.

⁵²³ See, e.g., *supra* para. 47.

⁵²⁴ RCN Comments at 7-8. See also Bartholdi Comments at 1-2; Bartholdi Reply Comments at 2; WCAI Comments at 23-26; Ameritech Reply Comments at 4.

⁵²⁵ RCN Comments at 7-8.

⁵²⁶ WCAI Comments at 23-26; Ameritech New Media Reply Comments at 4.

⁵²⁷ GTE Comments at 3-4.

⁵²⁸ NCTA Reply Comments at 15-16.

buildings. The Commission is currently addressing these issues in another proceeding, and we will not prejudice that proceeding by considering the issue in this proceeding.⁵²⁹

b. Copyright Act

192. In response to the *Notice*, commenters argue that federal laws and regulations prevent non-cable video programming providers from offering the range of programming choices that cable offers. In particular, although the Library of Congress, not the Commission, has jurisdiction over the Copyright Act, several commenters argued that application of that law inhibits competition in markets for the delivery of video programming. In particular, NRTC argues that the Copyright Act creates a barrier to competition by preventing DBS services from offering network broadcast programming to most of their subscribers.⁵³⁰ NRTC suggests that the Commission petition Congress to eliminate this restriction.

193. The Broadcast Network Affiliates argue in opposition that the Satellite Home Viewer Act restricts DBS access to network programming in order to protect both the relationship between networks and their affiliated local stations and the copyright that the affiliates have purchased in free market transactions.⁵³¹ The Broadcast Network Affiliates further argue that DBS providers are free to negotiate with the networks for a secondary retransmission license, but are not granted a compulsory license.

194. USTA raises a different argument about copyright law, expressing concern about inconsistencies between the Commission and the United States Copyright Office regarding the treatment of open video systems.⁵³² USTA asserts that, while the Commission has determined that open video systems will be treated like cable operators for the purposes of applying the cable compulsory license of broadcast programming,⁵³³ the Copyright Office has asked for comments on this issue.⁵³⁴ USTA argues that exclusion of open video systems from the cable compulsory license will raise their costs and reduce competition with incumbent cable operators. As we noted

⁵²⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Home Wiring)*, MM Dkt. No. 92-260, First Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561, 4575-76 ¶ 25 (1996).

⁵³⁰ NRTC Comments at 12-15; NRTC Reply Comments at 3-4.

⁵³¹ Broadcast Network Affiliates Reply Comments at 1-5.

⁵³² USTA Reply Comments at 10.

⁵³³ *Id.* at 10, n.19, citing, *Implementation of the 1996 Act, Open Video Systems*, CS Docket No. 96-46, Second Report and Order, ___ FCC Rcd ___, FCC 96-249 at ¶ 170.

⁵³⁴ *Id.* at 10, n.31, citing, *Eligibility for the Cable Compulsory License*, Copyright Office Docket No. 96-2, Notice of Inquiry, 61 Fed. Reg. 20197 (May 6, 1996).

earlier in this *Report*, the Copyright Office has been asked to issue a declaratory ruling on this issue.⁵³⁵

c. Pole Attachments

195. In the *1994 Report*, the Commission suggested that the need of many cable operators to enter into "pole attachment agreements" in order to lease space on utility poles had reemerged as a potential impediment to competition in video programming delivery markets.⁵³⁶ The 1996 Act created a distinction between pole attachments used by cable systems solely to provide cable service and pole attachments used by cable systems or by telecommunications carriers to provide any telecommunications service. Section 703 of the 1996 Act amended Section 224 of the Communications Act to, among other things, make the existing just and reasonable pole attachment rate formulas temporarily applicable to telecommunications carriers and cable operators providing telecommunications services.⁵³⁷ Congress directed the Commission to issue new pole attachment formulas within two years of the effective date of the 1996 Act.⁵³⁸ Section 703 also mandated access to utility poles, ducts, conduits, and rights-of-way, except in certain specified situations.⁵³⁹ The Commission is currently considering issues related to pole attachments in separate proceedings.⁵⁴⁰

3. Incumbent Behavior

196. In the *1995 Report*, the Commission noted that strategic behavior by incumbent firms can create impediments to entry and competition by rival service providers.⁵⁴¹ Strategic behavior may be designed to raise rivals' costs or decrease their access to customers. Because of the substantial sunk costs that entrants often must incur, strategic behavior by incumbents can deter entry by creating a credible threat that entry would be unprofitable. In that case, the entrants would be unable to recover their sunk costs because their systems could not be shifted to some other use.

⁵³⁵ *Supra* para. 48.

⁵³⁶ *1994 Report*, 9 FCC Rcd at 7555 ¶ 243.

⁵³⁷ 1996 Act, sec. 703 (codified as Communications Act § 224, 47 U.S.C. § 224(a)(4)).

⁵³⁸ 1996 Act, sec. 703 (codified as Communications Act § 224, 47 U.S.C. § 224(e)(1)).

⁵³⁹ 1996 Act, sec. 703 (codified as Communications Act § 224, 47 U.S.C. §§ 224(f)(1)-(2)).

⁵⁴⁰ *Implementation of the 1996 Act (Pole Attachments)*, CS Dkt. No. 96-166, Order, 11 FCC Rcd 954 (1996); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-93, First Report and Order, 11 FCC Rcd 15499 (1996).

⁵⁴¹ *1995 Report*, 11 FCC Rcd at 2154-56 ¶¶ 205-9.

197. In response to the *Notice*, commenters argue that cable operators are filing nuisance lawsuits, maintaining perpetual contracts, and offering selective discounts to disadvantage their rivals. Ameritech suggests that incumbents are engaging in strategic behavior to raise rivals' costs by nuisance lawsuits over franchise awards. In particular, Ameritech reports that incumbent cable operators have filed lawsuits seeking to block, delay, or invalidate competing cable franchises awarded to Ameritech.⁵⁴² In another instance, it has been reported that the New England Cable Telecommunications Association filed suit in the Connecticut Supreme Court to appeal a decision by the Connecticut Department of Public Utility Control to grant a statewide cable television franchise to Southern New England Telephone.⁵⁴³

198. Several commenters assert that cable operators have "perpetual" exclusive contracts with MDU owners that foreclose competition from new video distributors.⁵⁴⁴ OpTel claims that such contracts are "perpetual" because they are tied to the term of the MSO's franchise and any renewal or extensions thereof. In other words, argues OpTel, because franchise renewals and extensions for MSOs are all but automatic, the terms of these agreements are, for all practical purposes, "perpetual." Accordingly, OpTel urges the FCC to create a "fresh look" procedure which would permit MDU owners to "opt out" of "perpetual" MDU contracts for other competitive alternatives.⁵⁴⁵

199. The NCTA counters that OpTel is in error when it suggests that exclusive cable agreements with MDUs are the result of a "monopoly" while agreements between non-cable MVPDs and MDUs are not. NCTA asserts that there is no evidence to suggest that the process by which a franchise cable operator negotiates with MDUs differs from negotiations between, for example, a SMATV operator and an MDU, nor does labelling such contracts as "perpetual" make them less valid. Furthermore, the NCTA notes that since there were SMATV operators in existence when many of these contracts were signed in the 1980s, SMATV operators could have competed for them then.⁵⁴⁶ In addition, TCI argues that "perpetual MDU contracts" do not exist. Instead, TCI states, cable agreements to serve MDU buildings are often negotiated for a term equal to the life of the existing franchise term. At the end of the existing franchise term, TCI asserts, the MDU manager is free to renew, renegotiate, or terminate the agreement.⁵⁴⁷

⁵⁴² Ameritech Comments at 4.

⁵⁴³ *Communications Daily Notebook*, Comm. Daily, Nov. 12, 1996, at 5.

⁵⁴⁴ Bartholdi Comments at 22; OpTel at 3. *See also* Bell Atlantic Comments at 11-12.

⁵⁴⁵ OpTel Comments at 6-7.

⁵⁴⁶ NCTA Reply Comments at 19-20.

⁵⁴⁷ TCI Reply Comments at 13-17.

200. Commenters also disagree as to whether incumbents are engaging in strategic behavior to decrease the returns to new entrants by selectively offering lower prices to those subscribers who have switched, or are likely to switch, to the entrants' video services.⁵⁴⁸ RCN asserts that incumbent cable operators offer discounts selectively to individual MDU residents who subscribe to, or are negotiating with, non-cable video programming providers.⁵⁴⁹ WCAI and OpTel argue that the "bulk discount" exception to the Commission's uniform rate structure rules should apply only where the discount is deducted from a bulk payment by the MDU building owner on behalf of the individual residents.⁵⁵⁰ NCTA states in opposition to WCAI and OpTel that the bulk discount exception is the subject of a separate proceeding, where NCTA has presented its arguments.⁵⁵¹

B. Competitive Responses to Overbuilding

201. Entry into a video programming delivery market by a new distributor has elicited several different types of responses from the incumbent cable operator. An incumbent may respond to such a new rival by: (1) offering subscribers improvements in programming and other services; (2) reducing its prices by offering selective price discounts to some of its current subscribers, general discounts to all of its subscribers, or discounting a portion of its services (e.g., an upper tier, the Disney channel, etc.); (3) engaging in marketing efforts (e.g., advertising and telemarketing) to provide current and potential customers with information about its prices and services; and (4) seeking removal of regulations that limit its ability to respond to new entrants.

202. Although entry by a new video programming distributor using wireline delivery to subscribers may involve some duplication of assets (i.e., headend, distribution network, etc.) the gains to consumers in the form of lower prices and better services for customers of both the new entrant and the incumbent may outweigh the costs of such duplication. A recent study estimated that a franchise served by two cable systems (an overbuild area), on average, will have a 14% higher cost (including the cost of capital) than a single cable system serving the same franchise area. Nevertheless, the competition between the operators may result in lower prices and better services.⁵⁵²

⁵⁴⁸ See, e.g., Bartholdi Comments at 1-2.

⁵⁴⁹ RCN Comments at 3-4 and 8-9.

⁵⁵⁰ WCAI Comments at 16; OpTel Comments at 4.

⁵⁵¹ NCTA Reply Comments at 16-17, *citing*, Comments of NCTA, *Implementation of the Act of 1996 (Cable Act Reform)*, CS Docket No. 96-85 (June 28, 1996), at 44-45. See also *infra* App. H for a discussion of price discrimination complaints in connection with program access.

⁵⁵² Robert Crandall & Harold Furchtgott-Roth, *Cable TV Regulation or Competition?* 85 (Brookings Inst. 1996).

203. Preliminary evidence on how incumbent cable operators have responded to entry in a few markets is provided in the case studies below. We note that much of the evidence described below was obtained through press reports and thus must be viewed with caution. However, these case studies do provide some impression of the nature of competition in video programming delivery markets and how incumbent cable operators may respond to additional entry as it occurs in more markets in the future.

1. Case Studies

a. Dover Township, New Jersey

204. Adelphia is the incumbent cable operator in Dover Township, New Jersey with a subscriber base between 26,000 and 27,000 customers. In January 1996, FutureVision, a division of Digital Broadband Applications Corp, leased the current LEC facilities of Bell Atlantic ("BA") and began to provide 62 channels of programming services in the Township. As of mid-October 1996, FutureVision (now acquired by BA) had signed up 2,600 customers from a marketing base of 3,125 homes.⁵⁵³ In addition, BA plans to expand its LEC facility by adding 323 digital channels to serve 16,000 homes by the end of 1996 and 28,000 homes by the end of 1997. Seven competing video programming providers have already reserved a total of 304 of the planned 323 digital channel expansion.⁵⁵⁴

205. Since January 1996, both the incumbent cable operator and FutureVision have engaged in price competition resulting in a significant drop in their monthly services rates. Before FutureVision's entry, Adelphia charged \$25.28 per month for its 66 channel basic service package.⁵⁵⁵ FutureVision's initial monthly rate for its 62 channel basic service package was \$19.95. After FutureVision's entry, Adelphia reduced its basic service rate by 25% from \$25.28 to \$18.95 and planned to offer 11 more channels to the subscribers in the area served by FutureVision.⁵⁵⁶ FutureVision in turn reduced its monthly rate to \$14.95, a 21% reduction below the reduced price charged by Adelphia.

206. In addition to a reduction in monthly rates, Adelphia has announced that it will offer several expanded services, such as high-speed Internet access, local telephone service, a new analog set-top box with interactive features and future capability to offer up to 200 digital TV

⁵⁵³ Bell Atlantic Comments at 5. Ted Hearn, *FCC Gives Bell Atlantic First OVS Approval*, MutiChannel News, Oct. 21, 1996, at 14. BA acquired FutureVision in October 1996.

⁵⁵⁴ Bell Atlantic Comments at 5-6.

⁵⁵⁵ Petition, Exh. B, Adelphia Reply Comment at 9-10 *Adelphia Cable Corp. (Petition for Decertification and Finding of Effective Competition)*, CUID NJ0160 (May 28, 1996).

⁵⁵⁶ Raymond Fazzi, *Cable Firm Feeling Heat Trims Prices*, Asbury Park Press, Mar. 20, 1996, at A1, A5.

channels.⁵⁵⁷ Preliminary evidence on Adelphia's cable prices and services reported above suggests that Adelphia is offering selective price discounts to its current customers.⁵⁵⁸

207. Adelphia has argued, in a separate proceeding, that its ability to respond to FutureVision's entry has been hampered by state and federal regulations.⁵⁵⁹ For example, Adelphia argues that the 30-day notice requirement for price changes imposed by the New Jersey Board of Public Utilities and delays resulting from the Commission's regulations governing programming changes disadvantage Adelphia in its ability to compete with FutureVision. In addition, Adelphia argues that the general consumer notice provisions requiring advance notice to its customers increase its costs and limit its ability to respond to changes initiated by FutureVision.

208. Adelphia petitioned for decertification and a finding of LEC effective competition under Section 623(1)(1)(D) of the 1996 Act. Under this provision, the presence of a video programming delivery provider (FutureVision) offering comparable cable service using the facility of a LEC (Bell Atlantic) subjects the incumbent cable operator (Adelphia) to effective competition and thus justifies deregulated rates.⁵⁶⁰ In October 1996, the Commission issued an order finding effective competition in Dover Township and deregulated cable service prices for Adelphia.⁵⁶¹ In the *Order*, the Commission noted that competition in the Township had reduced monthly basic service rates. Also, the Commission found that cable subscribers are well aware of the availability of competitive video distribution services. Although BA's ability to serve some parts of the franchise area remains somewhat restricted, we concluded that competitive service was being offered in a manner sufficient to comply with the 1996 Act.⁵⁶²

b. Columbus, Ohio

209. Before June 1996, Coaxial Communications ("Coaxial") and Time Warner cable companies served the east and west sides of Columbus, Ohio, respectively. In June 1996, Ameritech started overbuilding in the Columbus area and launched a 78 channel cable service in

⁵⁵⁷ Leslie Ellis and Kent Gibbons, *Adelphia Puts Toms River in Display*, MultiChannel News, May 20, 1996, at 59.

⁵⁵⁸ Raymond Fazzi, *Cable Firm Feeling Heat Trims Prices*, Asbury Park Press, Mar. 20, 1996, at A2.

⁵⁵⁹ Adelphia Reply Comment at 9-10 *Adelphia Cable Corp. (Petition for Decertification and Finding of Effective Competition)*, CUID NJ0160 (May 28, 1996).

⁵⁶⁰ Comparable service is defined as 12 channels including some broadcast channels. 47 C.F.R. § 905(g).

⁵⁶¹ *Clear Cablevision, Inc. d/b/a Adelphia Cable Communication (Petition for Special Relief to Revoke the Certification of the New Jersey Board of Public Utilities to Regulate Basic Cable Rates in Dover, New Jersey)*, CUID No. NJ0160, Memorandum Opinion & Order, 11 FCC Rcd 12818, 12827 ¶ 18 (CSB 1996).

⁵⁶² *Id.*

direct competition with Time Warner and Coaxial.⁵⁶³ Ameritech first started to construct in Coaxial's service territory. By the end of 1998, 600,000 Columbus residents are expected to have access to Ameritech's cable services.⁵⁶⁴ Ameritech is currently offering 60 channel expanded basic service for \$27.95 a month. This monthly charge is \$1.95 less than Time Warner's charge for a 51 channel basic service and \$2.00 more than Coaxial's rate for a 54 channel extended basic service. For the 16,000 subscribers in areas where Time Warner has upgraded its system, Time Warner reduced its basic service price to \$26.95.⁵⁶⁵

210. After Ameritech's entry, both Time Warner and Coaxial responded by adding the Disney channel to their expanded basic package at no additional charge.⁵⁶⁶ Ameritech includes the Disney channel in its expanded basic channel line up. Unlike the case in Dover, however, where subscribers were offered price reductions by both the incumbent and entrant, in Columbus, neither Ameritech nor the incumbent cable companies have engaged in sharp price discounting. Instead, they are engaged in an intense marketing effort to limit each other's penetration in the market. For example, to create demand for its service, Ameritech is using targeted telemarketing and direct mail to encourage Coaxial's subscribers to switch to Ameritech. Coaxial has responded by spending \$250,000 in telemarketing and direct mail to Ameritech's subscribers pointing out Coaxial's price advantages. It has also initiated an incentive plan or "... bounty system that gives Coaxial installers and technicians a reward for every derailed [cancellation of] disconnect service call."⁵⁶⁷ Coaxial estimates that Ameritech has taken between 150 and 200 subscribers from its subscriber base of 98,000.

211. Both Time Warner and Coaxial, citing entry by Ameritech in their service areas, have filed for relief from cable rate regulations under the new provisions of the 1996 Act.⁵⁶⁸ In their petitions, Time Warner and Coaxial argue that they face effective competition in Columbus because: (1) Ameritech is a LEC; (2) Ameritech does not have any technical and regulatory impediments to entry into the Columbus franchise area and potential subscribers are aware of it; and (3) Ameritech offers video programming that is comparable to the incumbent's programming

⁵⁶³ K. C. Neel, *House-to-House Video Combat*, Cable World, July 15, 1996, at 30-31.

⁵⁶⁴ Ron Lietzke, *Ameritech Cable TV Construction Schedule Unveiled*, Columbus Dispatch, Apr. 24, 1996, at 2b.

⁵⁶⁵ Joe Estrella, *TCI Shaves Rates vs. Ameritech*, Multichannel News, Dec. 9, 1996, at 28.

⁵⁶⁶ Vindu Goel, *Ameritech Debuts Cable In Columbus*, Cleveland Plain Dealer, June 14, 1996, at 1C.

⁵⁶⁷ *House-to-House Video Combat*, *supra*, at 30.

⁵⁶⁸ *Time Warner Entertainment Company, L.P., d/b/a Warner Cable (Petition for Special Relief)*, CSR 4753-E (filed May 26, 1996); *Coaxial Communications (Petition for Special Relief)*, CSR 4789-E (filed July 15, 1996).

line up. On December 9, 1996, the Commission issued an order finding effective competition in the area served by Time Warner and deregulated cable services prices for Time Warner.⁵⁶⁹

212. In this case, the competitive responses in the Columbus area were twofold: (1) the incumbents added a premium program to the extended channel line up; and (2) both incumbents and the entrant engaged in intensive marketing efforts. This type of non-price response is not surprising since overbuilding requires large start-up expenses which limit the entrant's ability to lower its rates.⁵⁷⁰ One of the incumbents, Coaxial, actually has a relative price advantage over Ameritech.

c. *Chamblee, Georgia*

213. Scripps Howard Cable Company ("SH") has been providing cable services to the City of Chamblee, Georgia since 1984. Its system passes 2,887 homes in Chamblee and 44,491 homes in neighboring Dekalb County.⁵⁷¹ In April 1996, BellSouth was granted a cable franchise by the City of Chamblee, and it began offering cable services utilizing the facilities it had constructed for the purpose of providing VDT service. BellSouth's facility passes approximately 700 homes that are in SH's service area.

214. The announced capacity of BellSouth's Chamblee cable system is 80 channels. BellSouth's channel lineup, the "Americast Programming Package," includes many popular cable channels, such as CNN, ESPN, the Disney Channel and the History Channel. BellSouth plans to include two-way video technology, video on demand, and high speed personal computing services as a part of its total package.⁵⁷² It also plans to expand its service area to eventually encompass about 8,000 homes in Chamblee currently served by SH.

215. Information provided by BellSouth and SH indicates that both are competing on the basis of new service and limited term price discounts. For example, BellSouth and SH have undertaken major marketing initiatives to announce free new services and price discounts. After BellSouth's entry, SH announced that it would make substantial upgrades to its existing cable system and provide additional services at no extra charge to the cable subscribers in BellSouth's service area. It also offered a \$3 per month discount to subscribers who signed a 12 month service commitment and added popular channels similar to those offered by BellSouth. In

⁵⁶⁹ *Time Warner Entertainment Co.*, Memorandum Opinion and Order, ___ FCC Rcd ___, DA 96-2065 (CSB Dec. 9, 1996).

⁵⁷⁰ Price Colman, *Telco Competition Taking Toll*, *Broadcasting & Cable*, Oct. 21, 1996, at 46.

⁵⁷¹ *Scripps Howard Cable TV Company (Petition for Special Relief)*, CSR 4756-E (filed June 4, 1996) at 2.

⁵⁷² BellSouth Comments at 2-3.

addition, SH promised to offer free cable service to its customers for June 1996 and reduce its rates to half price for the month of July.⁵⁷³

216. BellSouth, in an apparent attempt to protect its subscriber base, offered its current cable subscribers several "free gifts" including Olympic Sponsorship Pin, free Caller ID telephone service, one free month of "Premiercast" basic cable service, and one free month of its advantage cable premium package to subscribers currently taking this package.⁵⁷⁴

217. As a result of BellSouth's entry into the Chamblee market, SH has petitioned for relief from rate regulation, citing the new LEC effective competition provisions of the 1996 Act.⁵⁷⁵ In its petition, SH argues that since BellSouth, a LEC, is offering comparable cable programming, its Chamblee system is subject to "effective competition."⁵⁷⁶

d. Clearwater, Florida

218. Time Warner is the incumbent cable operator in Clearwater, Florida with 700,000 subscribers. Time Warner offers a (limited) basic service, which includes local broadcast stations, for \$6.50. Its standard cable service, which includes the basic service plus 24 additional channels (including Disney, MTV, ESPN, TNT and USA) is offered at \$21.95.⁵⁷⁷ In June 1996, GTE was granted a competing cable franchise in the City of Clearwater.⁵⁷⁸ The GTE network already passes 50,000 homes in the Clearwater-St. Petersburg area. GTE plans to expand service to 150,000 homes by the end of 1996. The monthly charge for GTE's 23 channel basic service tier is \$10.95. A 63 channel cable programming service ("CPS") tier, (including Disney, MTV and Turner Classic Movie channel) is available at \$25.95 per month.⁵⁷⁹

219. According to GTE, Time Warner is offering additional programming services by adding premium programming to its most popular cable line up only to those households capable of receiving GTE's cable service.⁵⁸⁰ For example, GTE's most popular cable programming lineup included a number of premium channels like Disney, Turner Classic Movies and Cartoon

⁵⁷³ BellSouth Comments, Attach. A.

⁵⁷⁴ Scripps Howard Petition *supra* at Erratum, Attach.

⁵⁷⁵ *Id.* at 1.

⁵⁷⁶ *Id.* at 8.

⁵⁷⁷ Robert Trigaux, *A Cable Clash*, St. Petersburg Times, July 7, 1996, at 1H.

⁵⁷⁸ GTE Reply Comments at 8-10.

⁵⁷⁹ Frank Ruis, *GTE to Offer Cable TV in Clearwater*, Tampa Tribune, June 22, 1996, at A1.

⁵⁸⁰ GTE Reply Comments at A9-A10.